STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA CERRITO,

Plaintiff-Appellant,

v

K-MART CORPORATION and SEARS HOLDINGS CORPORATION,

Defendants-Appellees.

UNPUBLISHED
April 21, 2011

No. 294660
Macomb Circuit Court
LC No. 2008-004605-CZ

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

METER, J. (*dissenting*).

I respectfully dissent and would affirm the trial court's decision.

As noted by the majority, plaintiff was injured at defendants' store when a garden statue of two children sitting on a bench fell off a shelf and hit her in the face.[1] The statue consisted of two pieces—the children and the bench—and there were no screws connecting the two pieces, unlike "other models[, which] had the top piece screwed." Defendants' manager, Dorothy Banks, could not say whether these statues came already assembled or whether they were assembled at the store. Plaintiff testified that the statue was on a shelf over her head and that only the top piece fell and hit her. The employee who completed the incident report no longer works for defendants and could not be deposed. There is no dispute that defendants' employees are responsible for assembling products such as this statue and for stocking the shelves. Plaintiff testified that she did not know why the statue fell and could not say whether she might have knocked it over or whether someone else hit it; she stated that the "only thing I could think of is somebody, a worker or a customer, somebody might have bumped into the shelf."

Plaintiff's theory was that defendants failed to keep display merchandise in a "reasonable condition or properly assembled" and that defendants' agent failed to properly bolt the statue's

[1] Although it is not entirely clear from the record, defendant alleges that the shelf was approximately four feet high. This assertion is largely consistent with pictures provided. I cannot agree with the majority's statement that the shelf in question was an "overhead" shelf.

two pieces together. Defendants moved for summary disposition, arguing that a jury would be required to engage in speculation to infer that defendants breached a duty to plaintiff and caused her injuries, and that there was no evidence defendants had notice of the hazardous condition.

The trial court agreed with defendants. Specifically, the court found no question of fact regarding causation, noting that plaintiff testified that she did not know why the statue fell. The court also noted that, although there was no dispute that the two pieces of the statue were not bolted together, there was no evidence that this made this statue defective. In addition, the court found that even if causation were shown, plaintiff had not shown that defendants had notice of the danger, i.e., there was no evidence that defendants created the condition and no evidence showing how long the statue had been in the pertinent condition.

I conclude that the trial court did not err in dismissing this case. There is no evidence that defendants acted negligently. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Determining a breach of duty requires determination of the standard of care; determining causation requires an analysis of both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6, 6-7; 615 NW2d 17 (2000). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001); see also *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW2d 328 (2009). Cause in fact may be established by circumstantial evidence, but such proof must encompass reasonable inferences and not mere speculation. *Skinner*, 445 Mich at 163-164. An explanation that is consistent with known facts but not deducible from them is inadequate conjecture. *Id*. at 164.

While defendant owed plaintiff a duty to maintain its premises in a reasonably safe condition, there is no evidence that it did not do so. Plaintiff states certain things as facts that are simply unknown, such as who placed the statue on the shelf even though it had no screws, and how the screws came to be absent. There is no evidence regarding whether this kind of statue came already assembled or if it was assembled in the store and no evidence regarding whether the screws were never present or, alternatively, whether the screws were missing because they were defective and fell out, an employee did not tighten them sufficiently and they fell out, or another customer took them out. There is also no evidence concerning whether, had the two pieces been attached, the whole statue might have fallen on plaintiff, and there is no evidence that, even unscrewed, the top piece would have fallen without action from another force, such as a customer or plaintiff herself. A jury would have to speculate to reach the conclusion that defendants acted negligently.[2] Moreover, plaintiff herself confirmed the speculative nature of

[2] Contrary to the majority's contention in the footnote of their opinion, my conclusion about the jury's need to speculate is not based solely on whether K-Mart employees caused the statue's unscrewed condition. There is a litany of speculation that would have to occur in order for a jury to find for plaintiff in this case.

her claim, conceding during oral argument that there is no evidence that the condition of being unscrewed caused the statue to fall and conceding that there were a "litany of uncertainties" regarding what may or may not have caused the statue to fall.

Because there is no evidence that defendants created the condition, plaintiff, to proceed with her claim, must provide evidence that defendants had actual or constructive notice of the hazard. *Clark v K-Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Plaintiff argued below that the condition was not open and obvious because she could not tell upon inspection that the statue was unbolted. There is no testimony that the condition would have been apparent to store employees, either. Nor is there testimony about how long the condition existed. Although plaintiff states that "[t]his is not a case where another customer improperly placed the statue back on the wrong shelf," there is no evidence that that did not happen. The situation depicted in the photographs does not look hazardous, and plaintiff presents no evidence to show that it would appear otherwise to defendants' employees. In my opinion, reversal is unwarranted.

I would affirm.

/s/ Patrick M. Meter